FILED
JUN 4 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No.76-811

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioners,
vs.
ALLAN BAKKE,
Respondent.

BRIEF OF AMICUS CURIAE ASIAN AMERICAN BAR ASSOCIATION OF THE GREATER BAY AREA IN SUPPORT OF PETITIONERS

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PERNAU-WALSH PRINTING CO. - 862 MISSION STREET - SAN FRANCISCO, CA 94103

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BRIEF OF AMICUS CURIAE ASIAN AMERICAN BAR ASSOCIATION OF THE GREATER BAY AREA IN SUPPORT OF PETITIONERS

All parties have consented to the filing of this brief on behalf of the Asian American Bar Association of the Greater Bay Area in support of the Petitioners.[1]

I

INTEREST OF AMICUS CURIAE

The Asian American Bar Association of the Greater Bay Area [hereinafter "AABA"] is a voluntary bar

[1]The consent of both the petitioners and the respondent are being concurrently filed with the Clerk of Court in accordance with Rule 42(2) of the Rules of this Court.

association founded in 1976 and composed largely, though not exclusively, of Asian American attorneys who practice in the San Francisco Bay Area. Its membership also includes state officials and judges of the state and federal bench.

The goals of AABA are to identify and serve the legal needs of the Asian American community in general and of the Asian American members of the legal profession in particular. To those ends, AABA has numerous committees for public service and education, professional continuing legal education, public appointments, and litigation and legislation affecting the Asian American community.

AABA's interest in this case stems from its concern for the integration of what has been, and may yet continue to be, a nearly all-white legal profession in the country and especially in California. It is AABA's belief that the California Supreme Court's decision, if affirmed here, will all but ensure that minority groups, including Asian Americans, will continue to be grossly and perhaps permanently underrepresented in legal education and in the bar.

Moreover, as is made plain by the number and diversity of amici in this case, it is widely believed that the court's decision below, if upheld, may spell the end for all voluntary affirmative action programs in education and employment, thereby perpetuating the effects of centuries of racial discrimination.

AABA's basic position is, therefore, that meaningful and effective racial integration of the bar and

other institutions can only be attained through the use of remedial programs such as the one here at issue.

II

SUMMARY OF ARGUMENT

The University of California at Davis Medical School [hereinafter "University"] operated a special admissions program which allocated 16 of 100 positions in each medical school class for disadvantaged racial minorities. This program was found to be in violation of the Fourteenth Amendment's Equal Protection Clause in *Bakke v. Regents of the University of California,* 18 Cal.3d 34 (1976). Amicus AABA files this brief in support of the University's program and, more broadly, in support of all remedial affirmative action programs.

As a distinct racial minority group in the United States, Asian Americans have endured a long history of invidious racial discrimination. This prior history of discrimination, both de jure and de facto, was particularly evident in regard to education and employment in the professions. (Part IIIA1.)

Moreover, the results of this prior discrimination continue to be felt by Asian Americans today. These effects are compounded by the continued growth of the immigrant Asian population in the United States. As a group, therefore, Asian Americans still experience many language and educational handicaps, some of which are due to segregated public educational facilities. (Part IIIA2.)

In light of this notorious discrimination against Asian Americans and other racial minorities in the United States, the University was justified in adopting a remedial special admissions program, the purpose of which was to compensate for such prior discrimination. Because such racial classifications are not invidious as against the racial minorities affected, such programs should not be judged by the traditional "strict scrutiny" standard of equal protection under the Fourteenth Amendment. The University's program lacks the features that have traditionally led to invalidity under that standard. (Part IIIB1.)

Moreover, even if the University has not been found to be racially discriminatory, it may voluntarily adopt compensatory racial classifications. This is consistent with many cases that have upheld the use of remedial racial classifications. Both case law and federal regulations permit, and indeed encourage, the adoption of such voluntary remedial programs. (Part IIIB2.)

The proper rule of law in the case of remedial racial classifications is an intermediate standard between the traditional tests of " reasonable relationship" and "strict scrutiny". Such an intermediate standard would continue to subject racial classifications to close judicial analysis and would require, *inter alia*, a finding of specific need, a limited programatic duration, and a carefully defined scope. (Part IIIB3.)

Even assuming arguendo that the traditional "strict scrutiny" standard should be applied to the University's program, it is nonetheless constitutional. The program meets many compelling state interests,

and, in light of the specific goal to be served, the achievement of more minority representation in the student body and medical profession, is the least intrusive alternative available to the University. (Part IIIC1 and 2.)

III

ARGUMENTS

A. ASIAN AMERICANS HAVE SUFFERED AND CONTINUE TO SUFFER FROM INVIDIOUS RACIAL DISCRIMINATION

1. There is a long history of invidious discrimination against Asian Americans.

The plight of disadvantaged minority students seeking to gain entry into graduate and professional schools today stems from the history and continuing effects of de jure segregation and discrimination against minorities in the United States. Here Amicus AABA will attempt a brief recapitulation of the sordid treatment of Asian Americans, particularly in California and in regard to public education. *See* M. Konvitz, *The Alien and Asiatic in American Law* 219-30 (1946) [hereinafter "Konvitz"]; C. Wollenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1875* at 28-81 (1976) [hereinafter "Wollenberg"]. From this background it will be seen that there is abundant evidence of "prior discrimination" whose effects necessarily pervade current educational policies.

The earliest Asian immigrants to the United States and the first Asian victims of discriminatory legis-

lation, especially in California, were the Chinese. *See generally* E. Sandmeyer, *The Anti-Chinese Movement in California* (1939) [hereinafter "Sandmeyer"].

Virtually every civil right of the Chinese was attacked by invidious class legislation or judicial interpretation. The Chinese were assessed special and onerous taxes, such as the Foreign Miners' License tax[2], a passenger tax,[3] and a "Chinese Police Tax".[4] Such taxation did not end until Congress adopted the Civil Rights Act of 1870,[5] which prohibited such discriminatory taxes.

The Chinese were also prohibited from testifying for or against white persons in any court of law, in either civil or criminal proceedings. *Speer v. See Yup Co.*, 13 Cal. 73 (1859); *People v. Hall*, 4 Cal. 399 (1854).

Article XIX of the California State Constitution of 1879 represented the highpoint of anti-Chinese legislation. Section 1 authorized California counties, cities, and towns to remove all Chinese to beyond the State's borders. Section 2 forbade the employment of

[2]Act of April 13, 1850, ch. 97, §1 et seq., 1850 Cal. Stat. 221, *aff'd* in *People ex rel. Attorney General v. Naglee*, 1 Cal. 232 (1850). This tax was so successful (*see* M. Coolidge, *Chinese Immigration* 36 (1906)) that the California Legislature made it a statutory conclusive presumption that *all* Chinese were "miners" for purposes of the tax. Act of May 17, 1861, ch. 401, §93, 1861 Cal. Stat. 448. This presumption was invalidated by the California Supreme Court in *Ex parte Ah Pong*, 19 Cal. 106 (1861).

[3]Act of April 28, 1855, ch. 153, §1, 1855 Cal. Stat. 194.

[4]Act of April 26, 1862, ch. 339, §1, 1862 Cal. Stat. 462. This tax was also voided by the California Supreme Court in *Lin Sing v. Washburn*, 20 Cal. 534 (1862).

[5]Act of May 31, 1870, ch. 114, §16, 16 Stat. 144.

any Chinese, directly or indirectly, by any California corporation. Section 3 prohibited any public employment of Chinese. And Section 4 empowered the removal of Chinese without municipal boundaries or, in the alternative, the establishment of official Chinese ghettos. Fortunately federal courts declared the legislation adopted under Article XIX unconstitutional. Sandmeyer, *supra*, at 71-74. Article I of that same 1879 Constitution also denied the Chinese the right to own or inherit any real property and the right to vote.

Many local ordinances were also directed against the Chinese. It will be recalled that this Court developed its fundamental Fourteenth Amendment test of equal protection in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in regard to a city ordinance whose intended effect was to disable thousands of Chinese from operating their laundries in San Francisco.

Under intense pressure from these same anti-Chinese elements, federal legislation was adopted in 1875[6] resulting in the first wholesale exclusion of an entire national group from the right of naturalization, so that Chinese in America were, until 1943,[7] "aliens ineligible for citizenship". *See In re Ah Yup*, 1 F. Cas. 223 (C.C. Cal. 1878) (No. 104).

In 1882 Congress went further by "suspending" all immigration of Chinese laborers for ten years,[8]

[6]Act of February 18, 1875, ch. 80, §2169, 18 Stat. 318.

[7]Act of December 17, 1943, Pub. L. No. 78-199, 57 Stat. 600.

[8]Act of May 6, 1882, ch. 126, §1, 22 Stat. 58.

and this restriction was further stiffened in 1884.[9] Chinese immigration was totally and permanently prohibited in 1888, even though this contravened a then valid treaty.[10]

No sooner had the anti-Chinese movement subsided, after the ban on Chinese immigration, then sprang up another anti-Asian movement against the Japanese in America. *See* Y. Ichihashi, *Japanese in the United States* 228-318 (1932). Again, every effort was bent to deprive these Asians of their legal rights by systematic invidious legislation.

In the landmark case of *Ozawa v. United States,* 260 U.S. 178 (1922), this Court held that the Japanese petitioner, not being "a free white person", was an alien ineligible to become a naturalized American citizen.[11] From this result flowed a devastating series of schemes to deprive Japanese Americans of their civil rights.

The primary focus of early Japanese American economic endeavors was in agriculture, particularly in California. Hence, numerous "alien land laws" were enacted to prohibit Asians, but especially the Japanese, from owning or possessing any other legal

[9]Act of July 5, 1884, ch. 220, §4, 23 Stat. 115.

[10]Act of October 1, 1888, ch. 1064, §1, 25 Stat. 504, *aff'd* in *The Chinese Exclusion Case,* 130 U.S. 581 (1889).

[11]The court followed the same reasoning which, 44 years earlier, had deprived the Chinese of their right to naturalize, *supra,* at 7. The Japanese were not permitted to become naturalized citizens until the passage of the Immigration and Naturalization Act of 1952. Act of June 27, 1952, P.L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §1101).

interest in real property, such as the Washington statute upheld in *Terrace v. Thompson,* 263 U.S. 197 (1923), and the California statute in *Webb v. O'Brien,* 263 U.S. 313 (1923). *See* Konvitz, *supra,* at 148-70; McGovney, *The Anti-Japanese Land Laws of California and Ten Other States,* 35 Cal.L.Rev. 7 (1947); and Ferguson, *The California Alien Land Law and the Fourteenth Amendment,* 35 Cal.L.Rev. 61 (1947).

As with the Chinese, discriminatory taxation was imposed and then struck down. *See, e.g., In re Terui,* 187 Cal. 20 (1921). And blatantly racist attempts were made to prohibit Japanese from following even the most menial occupations, such as pawnbroker. *See, e.g., Asakura v. City of Seattle,* 265 U.S. 332 (1924). It was also held that Japanese in Washington had no right to incorporate a business, since they were aliens ineligible to citizenship. *Yamashita v. Hinkle,* 260 U.S. 199 (1922).

But no chronicle of the Japanese experience in the United States can be complete without a thoughtful and melancholy consideration of this Court's own decisions in *Hirabayashi v. United States,* 320 U.S. 81 (1943) and *Korematsu v. United States,* 323 U.S. 214 (1944). In *Korematsu,* the Court approved the wartime program of relocation and incarceration of 110,000 Japanese Americans. In his eloquent dissent, Mr. Justice Murphy called the *Korematsu* decision a "legalization of racism". 323 U.S. at 242. Innumerable scholars and many others have exhaustively analyzed these decisions and have uniformly found them

grossly repugnant to the Constitution and a deep stain upon the escutcheon of American civil liberty.[12]

Asian Americans have fought for almost a century in California and elsewhere to obtain equal opportunities in public education. In 1885, a young Chinese girl sued to obtain admission to the San Francisco public schools after school officials denied her application. *Tape v. Hurley,* 66 Cal. 473 (1885); *see* Wollenberg, *supra,* at 39-43. Although she gained admission, immediately thereafter the California Legislature enacted a statute to establish racially segregated schools for Asians, and that was California law until 1947.[13]

In October 1906 the San Francisco Board of Education adopted a resolution that assigned all Japanese children to the inferior, segregated school theretofore established for Chinese children. This policy was rescinded only by the filing of a federal civil rights lawsuit by the United States Attorney General, the personal intervention of President Theodore Roosevelt, and most ignominiously, the conclusion of the infamous "Gentlemen's Agreement" in which Japan informally agreed to end Japanese labor immigration to the United States. *See* Wollenberg, *supra,* at 48-75. And, as with the Chinese, section 1662 of

[12] *See, e.g.,* Rostow, *The Japanese American Cases—A Disaster,* 54 Yale L.J. 489 (1945); Konvitz, *supra,* at 241-79; and tenBroek, Barnhart and Matson, *Prejudice, War and the Constitution* 325-34 (1970 ed.).

[13] The original statute was the Act of March 12, 1885, ch. 117, §1, 1885 Cal. Stat. 99. It was repeatedly reenacted, including six times after 1900, until its repeal by the Act of September 19, 1947, ch. 737, §1, 1947 Cal. Stat. 1792. *See also Westminster School Dist. of Orange County v. Mendez,* 161 F.2d 774 (9th Cir. 1947).

the California Education Code continued the statewide policy of racially segregated public schools for the Japanese American until 1947. *Id.,* at 72.

The segregated San Francisco school system was upheld against a Fourteenth Amendment challenge by a Chinese American in *Wong Him v. Callahan,* 119 F. 381 (C.C. Cal. 1902). And in *Gong Lum v. Rice,* 275 U.S. 78 (1927), Chief Justice Taft, writing for the Court, approved the exclusion of Chinese American students from white schools in Rosedale, Mississippi, following the "separate but equal" doctrine of *Plessy v. Ferguson,* 163 U.S. 537 (1896).

This, then, is the legacy of exclusionary practices and policies that has deprived Asian Americans of their civil liberties, including access to equal education opportunities. It is respectfully submitted that no clearer proof of a history of "prior discrimination" need be shown.

Beyond access to educational institutions is the issue of access to the professions and other employment. Again, as to Asians, there is an abundant history of "prior discrimination" whose effects must be combated today by compensatory programs such as the one operated by the University here. Amicus AABA, composed of Asian American attorneys and deeply committed to the concept of equal justice under law, notes that, until the repeal of the discriminatory naturalization laws by Congress only 25 years ago, Asians in the United States, no matter how well qualified or how well trained, could be and were excluded from the professions.

In *In re Hong Yen Chang,* 84 Cal. 163 (1890), a Chinese attorney, trained at Yale and Columbia, was refused admission to the California Bar solely on the ground that he was an alien ineligible to citizenship due to his race. The Japanese met with the same racial barriers. In *In re Yamashita,* 30 Wash. 234, 70 Pac. 482 (1902), the Washington Supreme Court denied a Japanese applicant admission to the bar of that state solely on the ground of his race, although the opinion of the court plainly stated that he had "the requisite learning and ability qualifying him for admission". *See also* Konvitz, *supra,* 171-89. *Cf. In re Griffiths,* 413 U.S. 717 (1973).

2. Asian Americans still suffer from the effects of past discrimination.

Asian Americans, as a racial group, continue to bear the social and economic scars of a century of de jure and de facto discrimination. Though much progress has been made since the Second World War, Asian Americans have yet to reach parity with white Americans in many areas.

To this very day, Asian Americans are still subject to the effects of racially segregated public schools. In 1971 the San Francisco public schools were found to be racially segregated. *Johnson v. San Francisco Unified School Dist.,* 339 F.Supp. 1315 (N.D. Cal. 1971), *vacated and remanded on other grounds,* 500 F. 2d 349 (9th Cir. 1974). In *Lee v. Johnson,* 404 U.S. 1215 (1971), Mr. Justice Douglas expressly found that such racial segregation adversely affected Chinese American students in San Francisco. *See also Lau v.*

Nichols, 414 U.S. 563 (1974). In 1976 the California Supreme Court affirmed that the Los Angeles public schools were racially segregated. *Crawford v. Board of Education of the City of Los Angeles,* 17 Cal.3d 280 (1976). Based on 1970 Census data, 110,000 Asian Americans lived in the City and County of San Francisco, and another 238,000 lived in Los Angeles County[14]; thus, in these two areas alone, at least 15 per cent of all Asian Americans in the United States have had to endure the effects of racial segregation in the public schools *in this decade.* Other major California cities and towns, where many Asian Americans reside, have likewise been found to be operating racially segregated school systems. *See, e.g., Soria v. Oxnard School Dist.,* 386 F. Supp. 539 (C.D. Cal. 1974); *Spangler v. Pasadena City Bd. of Education,* 311 F. Supp. 501 (C.D. Cal. 1970); and *Hernandez et al. v. Board of Education of Stockton Unified School Dist.,* Civ. No. 101016, San Joaquin Super. Ct. (Oct. 9, 1974).

Even where Asian Americans have overcome the obstacles to equal educational opportunity, they have continued to be employed at levels incommensurate with their training.[15] Similarly, Asian Americans have substantially lower incomes per capita than white Americans despite having equivalent or superior edu-

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[14]Calif. Advisory Committee to the U.S. Comm'n on Civil Rights, *Asian Americans and Pacific Peoples: A Case of Mistaken Identity* 15 (Feb. 1975).

[15]Dept. of Health, Education, & Welfare, 2 *A Study of Selected Socio-Economic Characteristics of Ethnic Minorities Based on the 1970 Census: Asian Americans* (No. (OS) 75-121) 102-03 (1974) [hereinafter "Asian Americans"].

cational backgrounds.[16] Furthermore, these economic and educational disparities will likely increase for Asian Americans for the foreseeable future due to the continued influx of Asian immigrants to the United States. After the elimination of the discriminatory national origins quota system in the immigration statutes[17], over 750,000 Asian immigrants came to the United States between 1966 and 1975.[18] Approximately one-third of all these recent Asian immigrants have settled in California.[19]

Of paramount concern to AABA is whether the growing Asian American community, especially in California, will receive adequate legal representation. A major factor to be considered in the training of more lawyers for such work is language ability.[20] Not every applicant to law school can speak Chinese, Japanese, Korean, Tagalog or Ilocano with the fluency

[16] *Id.*, at 107-114.

[17] Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

[18] Immigration and Naturalization Service, U.S. Dept. of Justice, *1975 Annual Report* 65.

[19] *Id.*, at 57.

[20] Amicus AABA agrees with Mr. Justice Douglas that law schools should not be trying to produce black lawyers for black people (or, by extension, Asian American lawyers for Asian Americans). *DeFunis v. Odegaard*, 416 U.S. 312, 342 (1974) (dissenting opinion). In a strict sense, such a goal could be "parochialism", as Mr. Justice Mosk called it in the court below. 18 Cal. 3d at 53. However, the peculiar linguistic and cultural characteristics of minority groups such as Asian Americans simply cannot be ignored if professional schools are to produce good professionals for all Americans. *See* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. Chicago L. Rev. 653, 686-88 (1975) [hereinafter "Sandalow"], and O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 U.Va. L. Rev. 925, 944-45 (1974).

necessary to aid clients who do speak mainly or exclusively these languages. Yet, according to the U.S. Department of Health, Education, & Welfare, "[i]n 1970, 62% of Japanese, 76% of the Chinese and 64% of the Filipinos [in the United States] had retained their respective Asian languages as their mother tongue."[21] Under such circumstances, it is doubtful that non-Asian attorneys could even begin to deal intimately with Asian Americans' legal needs. "Moreover, there continues to be an influx of new [Asian] immigrants for whom mastering English is particularly difficult."[22]

This court itself has recently recognized the severe deprivation of equal protection that may result if such linguistic differences are not heeded. In *Lau v. Nichols*, 414 U.S. 563 (1974), this Court recognized the need for special programs for the thousands of Chinese non-English-speaking students in San Francisco's public schools. The lack of knowledge of English was equally present among both American-born Chinese-speaking children and Chinese immigrants in that case. Five of the named petitioners in *Lau* were American-born citizens of the United States.[23]

Perhaps most compelling is the patent underrepresentation of Asian Americans in the legal profession itself. In 1970, the ratio of Asian American attorneys to the Asian American population in the

[21] Asian Americans, *supra* n. 1, at 63.

[22] *Id.*

[23] Reply Brief for Petitioners at 4, *Lau v. Nichols*, 414 U.S. 563 (1974).

United States was only one-half the comparable ratio for white persons, as demonstrated by the 1970 Census data *infra*:

Racial Group	Attorneys[24]	Total Population[25]	Attorney: Persons
Whites	259,857	177,748,975	1 : 684
Japanese	512	591,290	1 : 1,555
Chinese	372	435,062	1 : 1,170
Filipino	120	343,060	1 : 2,859

In the 1970 Census, there were a total of approximately 2.09 million Asian Americans, of whom approximately 1,000 were attorneys.[26] Thus, Asian Americans comprised almost exactly one per cent of the nation's total population, but only three-tenths of one per cent of the nation's total lawyers.[27]

These graphic statistics demonstrate beyond any reasonable doubt the lingering effects of past racial discrimination against Asian Americans. Moreover, they show the clear need for programs directly aimed at substantially increasing the number of Asian American attorneys who will be required to serve the growing need for legal services in the Asian American community.

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[24]Bureau of the Census, U.S. Dept. of Commerce, *Census of Population: 1970, Final Report Occupational Characteristics* (No. PC(2)-7A) 12 [hereinafter "Occupational Characteristics"].

[25]Bureau of the Census, U.S. Dept. of Commerce, Release No. CB71-408 (October 20, 1971).

[26]*Id.;* Occupational Characteristics, *supra* n. 24, at 12.

[27]*Id.*

B. THE USE OF RACE TO REMEDY THE DISADVANTAGES CAUSED BY RACIAL DISCRIMINATION AGAINST MINORITY GROUPS IS NOT SUSPECT.

The University's special admissions program is designed to remedy the exclusion of minority groups from higher education in general, and the medical school in particular, which has resulted from prior racial discrimination against those minority groups. Amicus AABA contends that the use of racial criteria in such a program and, by extension, in all affirmative action programs, is not necessarily suspect despite the fact that non-minorities may to some extent be disadvantaged.

1. The use of race to remedy the effects of prior discrimination is consonant with the purposes of the Fourteenth Amendment and does not present the invidious features contained in traditionally disfavored racial classifications.

Previous equal protection decisions by this Court have involved only invidious discrimination against racial minorities so that, accordingly, a "strict scrutiny" test was appropriate. But, here, where the University's program is remedial and benign toward minorities disadvantaged by prior racial discrimination, a different policy is involved, and a different and intermediate equal protection standard should be applied.

The central purpose of the Fourteenth Amendment was to guarantee equality for blacks, *e.g., Slaughter-House Cases,* 16 Wall. 36 (1873), and by extension it has come to afford special protection for other minority groups. *See, e.g., Graham v. Richardson,*

403 U.S. 365 (1971); *Oyama v. California,* 332 U.S. 633 (1948); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). Those racial and national origin classifications traditionally found suspect and invidious by this Court have always involved either unequal treatment of a minority group, *e.g., Yick Wo v. Hopkins, supra,* or the exclusion of minority groups from participation in the majority social institutions, with the resulting stigma of inferiority. *See, e.g., Brown v. Board of Education,* 347 U.S. 483 (1954); *Hernandez v. Texas,* 347 U.S. 475 (1954); *Takahashi v. Fish and Game Commission,* 334 U. S. 410 (1948). In contrast, the medical school program here does not have the purpose or effect of segregating and stigmatizing either the participating minority groups or the majority white group.

It has also been argued that the use of racial classifications are suspect, because they have traditionally been utilized to disadvantage isolated and, powerless groups, *e.g., San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973); *Graham v. Richardson, supra; United States v. Carolene Products Co.,* 304 U.S. 144, 152-53 n. 4 (1938), or because such classifications have resulted in cumulative and pervasive disadvantage, *San Antonio Independent School Dist. v. Rodriguez, supra,* at 28; Brest, *In Defense of the Anti-Discrimination Principle,* 90 Harv.L.Rev. 1, 10 (1976). However, special admissions programs which benefit the victims of past racial discrimination are distinguishable and do not present these objectionable features.

Moreover, the majority has less need for comparable judicial protection since, as the politically dominant racial group, the majority retains greater access to political remedies for unreasonable or irrational remedial programs. The Fourteenth Amendment does not bar the majority from choosing to assume some of the necessary burden required to redress its own historic discrimination against minority groups.

Perhaps the greatest objection to the use of racial classifications is that, ideally, race is and ought to be simply irrelevant to any legitimate objective. Were it not for this nation's history of racial discrimination, AABA would concede that race should not be a relevant consideration in a professional school's admission program. However, where the school's purpose is to remedy the continuing effects of prior *racial* discrimination against minority groups, race is clearly necessary and relevant. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Education,* 402 U.S. 1 (1971); *Associated Gen. Contractors of Mass., Inc. v. Altshuler,* 490 F.2d 9, 16 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); *Porcelli v. Titus,* 431 F.2d 1254 (3rd Cir. 1970).

Special admissions programs that use racial classifications to remedy the disadvantages resulting from prior discrimination against minority groups are thus historically and conceptually distinguishable from those racial classifications traditionally found invidious and do not call into play the protective policies necessitating strict judicial scrutiny. Further, since

the program's purpose is remedial and is both consonant with and promotive of the purposes of the Fourteenth Amendment, the use of racial classifications in this context is constitutionally permissible.

2. Prior cases have permitted the remedial use of race without requiring strict judicial scrutiny.

While the constitutionality of voluntary preferential admissions programs is to be decided by the Court for the first time[28], numerous decisions of this Court and lower federal courts have recognized the validity, in analogous cases, of remedies framed in terms of race or ethnic status. In upholding these race conscious remedies the courts have not applied the strict judicial scrutiny test but some lesser standard. *See, e.g., Lau v. Nichols,* 414 U.S. 563 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Education,* 402 U.S. 1 (1971); *Associated Gen. Contractors of Mass., Inc. v. Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. den.,* 416 U.S. 957 (1974); *Porcelli v. Titus,* 431 F.2d 1254 (3d Cir. 1970); *Offerman v. Nitkowski,* 378 F.2d 22 (2d Cir. 1967).

Thus, this Court has required the assignment of public school pupils on racial grounds in order to promote school integration. *Swann v. Charlotte-Mecklenburg Bd. of Education, supra.* Special admissions programs likewise have the purpose and effect of integrating professional schools. Cf. *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* ..... U.S. ....., 45 U.S.L.W. 4221 (March 1, 1977).

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[28] *DeFunis v. Odegaard,* 416 U.S. 312 (1970), involving the validity of preferential admissions by a state law school, was held moot by the Court.

In the employment area, numerous cases have sanctioned the use of preferential minority hiring goals where minorities had been excluded from hiring opportunities in the past. *See, e.g., Carter v. Gallagher,* 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); *Contractors Association of Eastern Pa. v. Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971), *cert. denied,* 404 U.S. 854 (1971)[29].

A review of these cases reveals that there was often no history of racial discrimination by the employer. Rather, the finding of "prior discrimination" rested on an observed underrepresentation of minorities in various job categories along with the use of tests or other criteria which disproportionately excluded minorities. *See Carter v. Gallagher, supra; Pennsylvania v. O'Neill,* 348 F.Supp. 1084 (E.D. Pa. 1972), *modified,* 473 F.2d 1029 (3d Cir. 1973).

Affirmative action programs have not always been imposed only against the "guilty" discriminatory employer. In the so-called "Executive Order" employment discrimination cases (*e.g., Contractors Association of Eastern Pa. v. Secretary of Labor, supra; Associated General Contractors of Mass., Inc. v. Altshuler, supra*) employer affirmative action programs were upheld even absent a showing that the employers themselves had discriminated. Rather the remedial plan was imposed on employers to remedy discrimination by the *labor unions* which supplied the

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[29] These minority hiring goals "discriminated against" white job applicants to the extent they were not hired for jobs which they otherwise might have gotten but for the minority goal. *E.g., Carter v. Gallagher, supra.*

workers to the employer. The reasoning of these cases thus supports the use of remedial racial classification by an institution even though that institution might not have been guilty of prior discrimination.

Professional school special admissions programs use racial criteria to remedy the continuing effects of prior discrimination against minority groups by public school systems and other social institutions. Such prior racial discrimination, though not practiced by the professional school itself, operates to seriously disadvantage minorities seeking to enter the professional school. As with the labor unions discussed *supra,* these institutions "supply" the applicants for medical schools and other professional schools. Here, the University's medical school has therefore sought to remedy this disadvantage by taking into account such prior discrimination in applying its own admission criteria.

Finally, it is appropriate to note that regulations adopted by the U.S. Department of Health, Education and Welfare pursuant to Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) expressly allow the utilization of racial considerations. An educational institution which is the recipient of federal funds ". . . may properly give special consideration to race, color or national origin to make the benefits of its program more widely available . . ." 45 C.F.R. 80.5(j) (1976).

More importantly, the use of an affirmative action program to assure access to an educational institution where there exists *no* prior finding of past discrimination is expressly approved in 45 C.F.R. 80.3(b)(vii)(6)(ii) (1976):

> "Even in the absence of such prior discrimination, a recipient [of federal funds] in administering a program may take affirmative action to overcome the effects and conditions which resulted in limiting participation by persons of a particular race, color or national origin."

In *Lau v. Nichols, supra,* this Court, pursuant to Title VI, mandated that special educational benefits be provided to Chinese children in San Francisco who were linguistically disadvantaged due to their race and culture. Similar reasoning should permit a graduate or professional school under Title VI to modify its admissions criteria that might not otherwise adequately reflect the capabilities and potential of minorities who have been disadvantaged by prior racial discrimination. Thus, public policy as expressed in the Title VI regulations cited *supra* recognizes the validity of voluntary affirmative action programs such as the one here at issue.

As these authorities indicate, the propriety of such programs should not be measured by the traditional test of strict judicial scrutiny, because these programs are aimed solely at redressing the effects of previous racial discrimination. Rather, as discussed more fully *infra,* an intermediate equal protection test should be applied to such remedial racial classifications.

3. Special admissions programs benefiting disadvantaged minority groups can be operated in an equitable and reasonable manner.

That special admissions programs need not be subject to strict judicial scrutiny does not mean that any such program can pass constitutional muster. Several courts have utilized or suggested some alternative Fourteenth Amendment standards to evaluate remedial racial classifications. *See, e.g., Alevy v. Downstate Medical Center,* 39 N.Y.2d 326, 348 N.E.2d 537 (1976); *Bakke v. Regents of the University of California, supra,* at 80-82 (Tobriner J., dissenting); *Germann v. Kipp,* 45 U.S.L.W. 2486 (U.S.D.C. W.Mo. April 7, 1977). *See also* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HarvL. Rev. 1 (1972); Comment, 12 New England L.Rev. 719, 753-60 (1977).

Amicus agrees with the reasoning of the above cited authorities that more careful scrutiny is required here than the rational basis test ordinarily requires. Even the remedial use of race involves potential risks. Ostensibly remedial racial classifications may in fact further invidious purposes. Further, any use of race may encourage an undesired race consciousness in our society. *See United Jewish Organizations of Williamsburg, Inc. v. Casey.* ..... U.S. ....., 45 U.S.L.W. at 4229 (March 1, 1977) (Brennan, J., concurring.)

Amicus AABA suugests these other important considerations in evaluating special admissions programs. First, there must, of course, be a showing of some

need for remedial action. Prior discrimination by the institution seeking to implement the remedial effort would not be required. Rather, it would be sufficient to show that a particular minority group is disadvantaged because of the continuing effects of prior racial discrimination, with the result that the minority group has been disproportionately excluded from participation in that institution. For example, a finding of need could properly be based on historical discrimination against a particular minority group, along with a statistically significant underparticipation of that minority group in the institution in question.[30] It would be desirable if such a finding of need could be made prior to implementation of a program.

A second consideration is that any special admissions program be strictly limited in duration. Such a program should be discontinued when minority groups are no longer disproportionately excluded by the normal admissions process, either because currently criticized admissions tests have been replaced by validated and racially neutral tests, or because the effects of the prior discrimination have been dissipated and adequate numbers of minorities are being admitted under the regular admissions criteria.

Finally, the scope of a school's program should bear a reasonable relationship to the needs of each minority group affected, but in no event should unqualified

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[30]Especially significant here would be evidence that unvalidated standardized tests and other traditional admission criteria (such as grades) disproportionately excluded minority applicants. *Cf. Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).

applicants be admitted. For example, a school may permissibly set "targets" proportional to each of the minority groups represented within the population served by the school. Likewise, the school may, if it chooses, restrict a program to *disadvantaged* minority students, as did the University here. 18 Cal. 3d at 42 n.8.

C. EVEN IF THE "STRICT SCRUTINY" TEST IS APPROPRIATE FOR REMEDIAL RACIAL CLASSIFICATIONS, SUCH CLASSIFICATIONS ARE CONSTITUTIONALLY PERMISSIBLE.

As noted *supra,* AABA believes that an intermediate equal protection test is proper for use in cases involving remedial uses of racial classifications. But, assuming arguendo that the so-called "strict scrutiny" test derived from *Korematsu v. United States,* 323 U.S. 214 (1944) is applicable, the University's special admission program is nonetheless constitutional. It meets a number of compelling state interests, and, more importantly as regards *racial* integration, there is patently no less restrictive alternative than a program that honestly and in a limited fashion considers the race of the applicants.

1. Compelling state interests are served by remedial special admissions programs.

The California Supreme Court identified the following state interests as supportive of the University's program and "compelling" (18 Cal.3d at 52-53):

> (1) Racial integration of the medical school and of the profession;
>
> (2) Cultural diversity of the student body, which will assist all students to become more aware of and sensitive to the specific needs of minority communities;
>
> (3) Provision of successful role models for minority children and adolescents; and
>
> (4) Expansion of the number of doctors who will serve in minority communities, which have the least and poorest medical services.[31]

In a generalized application, each of these goals is a valid and substantial interest that warrants a limited racial classification such as made by the University in this case. The discussion below focuses on the application of these goals to Asian Americans and the legal profession, but the validity of the concepts extends to all minorities and all professions.

To begin with, the number of Asian American attorneys is woefully low, *supra,* at 16. The historical reasons for this condition—almost a century of vicious and unrelenting de jure discrimination—are set forth more fully *supra,* at 5. Given such a disparity, it is a vital and legitimate state interest to seek to integrate the legal profession by special admission programs at state law schools, as California's law schools have done.

The cultural diversity of the classroom is an equally vital state interest. California, in particular, is probably the most diverse state culturally in the entire country, with large numbers of immigrants from

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[31]The court below rejected a fifth argument advanced by the University, assurance of physicians who would have greater personal rapport with their patients. 18 Cal.3d at 54.

Europe, Asia, and Latin America. In particular, over one-third of all Asian Americans in the United States (almost 600,000 persons) reside in California.[32] Many are immigrants or first generation descendants of immigrants and have their own distinctive physical, economic, and social traits that require special understanding or attention in the lawyer-client, doctor-patient, or other professional relationship. The beginning of that understanding by all students, regardless of race, is in the integrated classroom where each student hones "his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." *McLaurin v. Oklahoma State Regents,* 339 U.S. 637, 641 (1950).

The availability of successful role models is also an important state interest in terms of furthering the integration of all social and political institutions. In the Asian American community, with its one thousand attorneys in the entire country, it is virtually impossible at this time to give such role models to Asian American children who will become the lawyers and other skilled persons in the future. But, as importantly, those models are important to white and other non-white children, so that they may learn that all professions in this country are open to, and populated by, members of all races.

Increasing the number of Asian American attorneys who would work in and for the interests of Asian American communities is, likewise, a bona fide compelling state interest. Those communities, like other

[32]Asian Americans, *supra* n. 1, at 16.

minority communities, currently receive the least and lowest quality legal services. It is highly significant, therefore, that a declared interest in community service work was a leading criterion in the University's program here in question. 18 Cal.3d at 52.

There is a fifth and related state interest which was not recognized by the Court below but which is of special concern to amicus AABA. That interest is in providing professionals who can adequately serve the unique needs of Asian American and other minority communities with substantial numbers of non-English speaking persons. An essential prerequisite to the delivery of effective legal services is the ability to communicate between the attorney and the client. As noted *supra* at 15, fully two-thirds of all Asian Americans have a mother tongue other than English. Often the language used is one that is rarely, if ever, taught in American schools, such as the Chinese and Filipino dialects.[33] Under these circumstances, it is a compelling state interest to ensure that such minorities receive adequate legal services by training law students who are native speakers, *i.e.* who are themselves members of these linguistic minority groups.

2. No less restrictive means are available to the University.

The second part of the traditional "strict scrutiny" test is whether a less restrictive alternative to achieve the same end is available. The court below thought there were less restrictive alternatives available to the

[33]Asian Americans, *supra* n.1, at 64-65; *A History of the Chinese in California* 4 (T. Chinn ed. 1969).

University. 18 Cal.3d at 53-55. Amicus AABA respectfully submits this was an erroneous conclusion.

The four interests identified by the University and accepted by the court below (18 Cal.3d at 53) are each bottomed on one consideration: the achievement of a *greater racial minority enrollment* in the medical school. That is the one goal against which all alternatives, those proposed by the court below as well as those implemented by the University, must be tested.

The California Supreme Court suggested the following alternatives to the use of racial classifications (18 Cal.3d at 54-56):

1. greater flexibility in admissions standards;

2. recruitment programs aimed at encouraging applications from "disadvantaged students of all races";

3. the provision of remedial instruction for educationally disadvantaged applicants; and, finally,

4. increasing the number of medical school openings by either expanding the number of available admissions to existing institutions or increasing the number of medical school facilities.

Unfortunately, each of these alternatives, and the combination of them, can have only an attenuated and marginal impact on the goal of curing minority underrepresentation in the medical school.[34]

[34] Amicus assumes that the California Supreme Court did not offer the above alternatives as a vehicle for the continued implicit consideration of race. Yet as shown *infra*, three of the four alternatives would be ineffective in increasing minority enrollment except to the extent that they acted as a proxy for race.

The first suggestion, more flexible admissions standards, was already the University's practice, as shown in the court's own opinion. 18 Cal.3d at 47. Moreover, as Professor Sandalow has observed, such standards would not necessarily result in an increase in the percentage of minorities enrolled without a very substantial and unlikely increase in the overall percentage of disadvantaged students admitted. Racial minorities, though often disadvantaged, are even a minority of the class of disadvantaged Americans. Sandalow, *supra* n. 20, at 690-91. Thus, to achieve even approximately the same number of minority admittees, the University would have to dedicate a far higher proportion of its class spaces to "disadvantaged" persons.

The second and third suggestions, more "aggressive" recruitment and more remedial instruction of disadvantaged students generally, suffer from the same fatal flaw. Even if such recruitment and instruction succeeded, the result would be more white students attracted than racial minorities precisely because these minorities are a minority of the disadvantaged. *See* Sandalow, *id.* Moreover, the suggestion is impractical in terms of time and uncertain in effect, since it may take years of such effort to produce the same approximate number of minority students as the University's current program.

In this regard, it would be well to note the observation of the Washington Supreme Court in *DeFunis v. Odegaard*, 82 Wash.2d 11, 36, 507 P.2d 1169, 1184 (1973), *vacated*, 416 U.S. 312 (1974):

> "It has been suggested that the minority admissions policy is not necessary, since the same objective could be accomplished by improving the elementary and secondary education of minority students to a point where they could secure equal representation in law schools through direct competition with non-minority applicants on the basis of the same academic criteria. This would be highly desirable, but 18 years have passed since the decision in *Brown v. Board of Education,* supra, and minority groups are still grossly underrepresented in law schools. *If the law school is forbidden from taking affimative action, this underrepresentation may be perpetuated indefinitely.*" (emphasis added)

Finally, expansion of the number of medical school facilities, while certainly desirable, cannot be achieved in the short term absent a significant and prohibitively expensive program of institutional construction. Further, immediate expansion of medical school facilities will not significantly promote proportionately greater numbers of minority admissions, though it would, of course, contribute to the amelioration of the need for more medical professionals. And additional spaces in each medical school class are strictly limited by the existing physical plants and other resources of the schools; adding more students to the present resources would only result in a diluted and inferior medical education for all students.

In summary, this analysis demonstrates the unfeasibility of the suggestions made by the California Supreme Court regarding alternatives to the use of racial classifications. None of the suggestions made

would come even close to the achievement of the primary goal of the University: the correction of the underrepresentation of racial minorities in its student body and, ultimately, in the medical profession itself. Similar objections may be made to these suggestions in the context of other professional school special admissions programs. Thus, the court below erred in applying the second test of strict judicial scrutiny; the University's program does, in fact, represent the least intrusive alternative, in light of the end sought to be achieved.

IV

CONCLUSION

The special admission program conducted by the University of California at Davis Medical School is constitutional, whether measured by an intermediate or "strict scrutiny" equal protection test under the Fourteenth Amendment. Accordingly, the judgment of the California Supreme Court should be reversed.

Dated: June 3, 1977.

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